Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

CAL-ALMOND, INC., BAL NUT INC., CENTRAL VALLEY GROWER PACKING, HOCKER NUT FARM, JARDINE ORGANIC RANCH, ROTTEVEEL ORCHARDS, THERON SHAMOCHIAN INC., BEARDS QUALITY NUT CO., AMARETTO ORCHARDS and CARLSON FARMS,

Petitioners,

v.

U.S. DEPARTMENT OF AGRICULTURE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Amendment is violated by a mandatory advertising program under which the government imposes financial penalties on private industry members whose own advertising does not satisfy content-based standards, or who choose to remain silent.

RULE 29.6 STATEMENT

None of the petitioners has any parent corporations, and no publicly held company owns 10% or more of any of petitioners' stock.

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Petitioners, ten almond handlers, respectfully ask this Court to issue a writ of certiorari to review the decision of the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, 1a), is reported at 192 F.3d 1272 (9th Cir. 1999). The opinion of the district court (App. B, 12a) is unreported. The opinion of the U.S. Department of Agriculture judicial officer (App. D, 23a) is unreported. The opinion of the administrative law judge (App. E, 144a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on September 21, 1999. A timely petition for rehearing was denied on November 12, 1999 (App. G, 275a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law * * * abridging the freedom of speech."

The relevant provisions of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. § 601 *et seq.*, as amended) are set forth at App. H, 276a. The relevant post-1993 Almond Marketing Order regulations are set forth at App. I, 293a. The relevant pre-1994 advertising regulations are set forth at App. J, 309a.

STATEMENT OF THE CASE

This case involves a government-mandated advertising program in which almond handlers who convey a commercial message selected by the government pay less, while almond growers who choose to remain silent, or convey a message other than that selected by the government, pay more. This content-based financial burden on protected commercial speech goes beyond anything approved by this Court in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), and is fundamentally at odds with the freedom of speech guaranteed by the First Amendment.

A. Advertising Provisions in Federal Marketing Orders

The Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, as amended (the "Act"), establishes a regulatory program for certain agricultural commodities, including almonds. Among other things, the Act authorizes compulsory "marketing promotion including paid advertising" for the commodity. *Id.* § 608c(6)(I). Advertising programs are administered by industry boards whose members are appointed by the Secretary of Agriculture (the "Secretary"). *Id.* §§ 608c(7)(C), 610. The costs of these advertising programs are paid by assessments imposed on all handlers of the particular commodities (*id.* § 610(b)(2)(ii)).

These advertising programs are of two different types, as set forth in two different subsections of the Code of Federal Regulations for each marketing order adopted by the Secretary. The first type, *see, e.g.*, 7 C.F.R. § 981.41, is a mandatory program in which all handlers of the commodity pay assessments to their industry boards, which use those

assessments to produce and disseminate generic advertising promoting the covered products. This type of program was upheld in *Wileman*.

The second type of advertising program, *see, e.g.*, 7 C.F.R. § 981.441, which was not at issue in *Wileman*, allows handlers a "choice": they must either advertise their own products in accordance with restrictions specified by regulations adopted by the Secretary and applied by the industry board, in which case they receive a total or partial credit against their assessments, or they may pay the full assessment to the Board for generic product advertising just as under the mandatory assessment program. The criteria for creditability are content-based, highly restrictive, and significantly favor the dominant cooperative in the industry, as described more fully below.

B. The California Almond Industry And The Almond Marketing Order

The California almond industry is made up of two types of producers and handlers. By far the largest producer and handler in the industry is Blue Diamond Growers, Inc. ("Blue Diamond"), an agricultural cooperative. *See* App. at 217a; *see also Cal-Almond, Inc. v. U.S. Dep't of Agric.*, 14 F.3d 429, 438 & n.9 (9th Cir. 1993) (found at App. F, 228a). Between 1986 and 1991, Blue Diamond handled more than 50% of all California almonds produced annually; its market share for subsequent years, although slightly diminished, was still significant. *See* App. at 217a. Blue Diamond supplies approximately 90% of all almonds sold to retail customers as snacks or for home cooking, both through other retailers and through its own independently-operated retail outlets. *See* App. at 217a. Petitioners, in contrast, process and sell

nearly all of their almonds for use as ingredients in products such as candy, ice cream, or cereal; they also export a significant portion to overseas buyers. *See* App. 158a, 165a-213a. Petitioners sell few or no almonds at domestic retail as snacks or for home cooking, and they do not operate retail outlets. *See ibid.*

Overall, the vast majority of all almonds grown in California are sold as ingredients for other products; candies, cereal, and ice cream are the three largest uses of almonds as ingredients. *Ibid* and App. 221a. Almonds sold for domestic consumption as snacks represent just a small percentage of overall sales of California almonds. *Ibid.*

California almond growers and handlers are subject to an almond marketing order, 7 C.F.R. Pt. 981, issued by the U.S. Department of Agriculture pursuant to the Act. The almond marketing order imposes assessments upon handlers based on the tonnage of almonds handled. *Id.* § 981.81(a). The marketing order authorizes these assessments to be spent on general advertising, promotion, and marketing of almonds "designed to assist, improve, or promote the marketing, distribution, consumption or efficient production of almonds." *Id.* § 981.41(a); 7 U.S.C. § 608c(6)(I). Per-handler assessment amounts are sizable; for the 1997-1998 crop year, for example, estimated assessments for the approximately 100 almond handlers subject to the almond marketing order were $13 million, of which $8.5 million was budgeted for advertising, marketing, and promotion. *See* Almonds Grown in California, 63 Fed. Reg. 39,755-39,756.

The marketing order is administered by the California Almond Board. *Id.* § 981.38. The Board is made up of ten members, who are industry representatives appointed by the

Secretary. *Id.* §§ 981.30, 981.31. Because of its dominant position as the largest cooperative producer and handler in the industry, Blue Diamond has held between four and six seats at all times since 1986, giving it effective control of the Board.[1] App., 217a. Furthermore, because changes in the Board's advertising and promotional policy require the approval of seven out of ten Board members, 7 C.F.R. § 981.40(e), Blue Diamond has had veto authority over Board-run advertising and promotion throughout all the years in question.

The almond marketing order gives handlers credit for any amounts they spend independently on **authorized** advertisements, up to the total amount of assessments used for advertising and marketing under the marketing order. *Ibid.*; 7 C.F.R. § 981.41(c). Virtually all of the assessments imposed by the Board between crop years 1985-1986 and 1995-1996 were used for advertising, marketing, and promotional activities under the marketing order.

For crop years 1986-1987 through 1992-1993, the marketing order had "creditability" provisions, which gave a handler 100% credit against its assessment for monies spent both for generic advertising and for advertising its own brand. 7 C.F.R. § 981.41(c); *id.* §§ 981.441(c)(3)(i)(A) and (B) (1992). (App. 309a *et seq.*) To earn credit, however, the advertising had to satisfy the extensive requirements of the

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1. Under the almond marketing order, Blue Diamond — as the largest cooperative producer and handler in the almond industry — receives at least four seats on the Board regardless of the volume of almonds it handles. *See* 7 C.F.R. §§ 981.31(a)(1), (b)(1). It receives six seats in crop years in which it handles more than 50% of the annual tonnage of California almonds, *id.* § 981.31(c), as was the case between 1986 and 1991. App. 217a.

creditable advertising regulations, 7 C.F.R. § 981.441 (1992). No credit was available for advertising that referred to "more than two complementary branded products"; for advertising that promoted "noncomplementary" products or "competing nuts"; or for advertising that "direct[ed] consumers to one or more named retail outlets" not operated by the handler. 7 C.F.R. § 981.441(c)(5) (1992). In addition, under 7 C.F.R. § 981.441(c)(3)(iv) (1992):

> When almond products, other than almond butter, are advertised, the credit shall be 50 percent of the total allowable payment to the advertising medium or 50 percent of the handler's payment thereof, whichever is less: *Provided*, That (A) the almond product does not contain nuts other than almonds, (B) the almond product contains at least 50% raw shelled almonds by weight, and (C) the almond product displays the handlers' brand.

The effect of these restrictions was to allow handlers to receive a credit for advertising almonds for retail to consumers but to disallow credits for advertising almonds as ingredients.[2] Thus, for example, petitioner Cal-Almond, Inc., whose domestic sales of almonds are almost all for use in ice cream (App. 166a, 172a-175a), could not receive credit for its domestic advertising because almonds do not make up 50% of the net weight of the package of ice cream.

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2. Handlers were also given 100% credit for advertisements in a foreign market, but only if the advertisements were (i) made pursuant to a contract with the Foreign Agricultural Service, the U.S. Department of Agriculture, or the California Department of Food and Agriculture; or (ii) the advertisements were "brand" advertisements — *i.e.*, promoted a specific brand of almonds such as "Blue Diamond." 7 C.F.R. § 981.441(c)(4) (1992).

7 C.F.R. § 981.441(c)(3)(iv) (1992). By contrast, Blue Diamond could obtain full credit for advertising its own brand, and then benefit a second time when the Board used the assessments paid by producers of ingredient almonds to run "generic" ads promoting the retail sales of almonds for consumption — where Blue Diamond has a 92% market share. As the Ninth Circuit recognized in 1993, "there seems to be no logical justification for these types of restrictions other than the restrictions are designed to benefit Blue Diamond, who overwhelmingly dominates the retail almond market, at the expense of smaller handlers * * * who sell primarily to ingredient manufacturers." *Cal-Almond*, 14 F.3d at 440. (App. F, 228a, 249a-250a)

In 1993, the Secretary proposed amendments to the marketing order provisions governing creditable advertisements. *See* Almonds Grown in California, 58 Fed. Reg. 43,500 (1993). Those amendments, with additional changes, were made final in 1994. *See* Almonds Grown in California, 59 Fed. Reg. 35,222 (1994) (codified at 7 C.F.R. § 981.441). The amended marketing order was enacted over numerous objections by handlers of California almonds (including Cal-Almond), the Small Business Administration, and others that the almond advertising program was ineffective and unfairly skewed in favor of handlers (most notably, Blue Diamond) who sell almonds for retail consumption.[3] *See* 59 Fed. Reg. 35,222.

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3. The Small Business Administration contended that regulations were harmful to small handlers, most of whom sell their almonds to be used as ingredients in other products, because handlers were not given full credit against their assessments for advertising designed to increase ingredient use. *See* 59 Fed. Reg. 35,222, 35,230 (1994).

Section 981.441, as amended, contains a "credit-back" scheme: handlers receive credit for only two-thirds of the amounts spent on creditable advertising and promotion (rather than the 100% credit provided for under the prior regulation). 7 C.F.R. § 981.441(a) (1994). (App. I, 293a, 302a.) The definition of creditable advertising remains subject to strict content-based criteria. Advertisements of almonds must be "directed to end-users, trade or industrial users" in order to be creditable. *Id.* § 981.441(e)(4)(i). If an advertisement promotes a product containing almonds, its cost is creditable only if the product "display[s] the handler's name or brand, or the words 'California Almonds[,]' on the primary face label"; even then, the handler receives credit only for the portion of the advertisement's cost equivalent to the proportion of almonds in the product. *Id.* § 981.441(e)(iv). The cost of advertisements for "complementary products" such as mixed nuts or trail mix is creditable only if "the handler's name or brand, or the words 'California Almonds' " appear in the ad, and again, only that portion of the cost equivalent to the proportion of almonds in the complementary product is creditable. *Id.* § 981.441(e)(iii).

Under these new regulations, if Cal-Almond — which sells almonds for use as ingredients in products such as Dryer's ice cream — attempts to increase demand for almonds by spending $300,000 to advertise toasted almond ice cream (which contains 3-6% almonds) (App. 174a), it receives a "credit-back" of between $6,000 and $12,000 against its mandatory assessment. Furthermore, no credit is given unless Dryer's includes the words "Cal-Almond" or "California Almonds" on the front label of each ice cream container.[4]

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4. There are other restrictions as well. A handler does not receive credit, for example, for advertising in publications that target (Cont'd)

Under both current and former regulations, almond handlers seeking credit against their marketing order assessments must file claims with the Board for approval. The Board is authorized to reject a claim — even if an advertisement satisfies the content-based criteria set forth in Section 981.441 — if it finds that the advertisement's "clear and evident purpose" is not "to promote the sale, consumption or use of California almonds." 7 C.F.R. §§ 981.441(a), (c)(2) (1992); 7 C.F.R. §§ 981.441(a), (e)(2) (1994). For creditability determinations prior to 1994, aggrieved handlers had no statutory right of review. Under the 1993-1994 revisions, handlers may request review of an adverse decision by the Board, with a right of appeal to the Secretary. *Id.* § 981.441(f).

C. Procedural Background

1. In 1994, Cal-Almond and the other petitioners filed administrative petitions with the U.S. Department of Agriculture, alleging that the mandatory advertising program and its creditable advertisement provisions violated their First Amendment rights. Petitioners sought recovery of assessments used for advertising from crop years 1986-1994 onwards, and an injunction against continued enforcement of the mandatory advertising program. All petitioners also sought recovery of assessments dating back to crop year

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(Cont'd)
"the farming or grower trade." *Id.* § 981.441(e)(3). Billboard advertisements are not permitted in eleven California counties — not coincidentally, counties in which large quantities of California almonds are grown — unless the advertisement "directs consumers to a handler-operated outlet offering direct purchase of almonds." As noted above, Blue Diamond operates several retail stores; petitioners operate none.

1986-1987. App. 146a. Cal-Almond's creditable assessments for just two years were approximately $650,000 (App. 173a); in total, petitioners sought well over four million dollars for credit-back and creditable advertising assessments paid to the Board. (App. 173a-213a.)

The petitions were heard by an Administrative Law Judge ("ALJ"), who made extensive findings of fact based on a record developed in seven days of hearings, at which 43 witnesses testified and 300 exhibits were introduced. *Id.* 144a.

The ALJ first determined that the marketing order advertising program and creditability regulations, although nominally designed to benefit all almond growers, did not do so. The ALJ found that overall advertising for almonds prior to 1991 was "dominated" by Blue Diamond: between crop years 1987-1988 and 1990-1991, the total expenditure by the Almond Board for generic advertising, promotion, and marketing ranged from $840,000 to $1,400,000 per year; during the same period, Blue Diamond spent between $8 and $14.2 million per year on its own, branded advertising. *Id.* at 157a.

Furthermore, the ALJ found, Blue Diamond would have continued to advertise its brand in the absence of the marketing order. The significant discrepancy in advertising expenditures thus created a risk that Blue Diamond's non-advertising competitors would undercut its prices. *Id.* 157-158a. The almond marketing order solved this problem by "requir[ing] Blue Diamond's competitors to make equivalent expenditures" in the form of mandatory assessments under the almond marketing order. *Id.* 158a.

Blue Diamond could continue to run its own branded advertisements aimed at the retail almond market, and receive full credit against marketing order assessments under 7 C.F.R. § 981.441(c) (1992). *Id.* 158-160a. Its competitors could not pursue a similar advertising strategy, because they sold almonds for use as ingredients and advertisements designed to increase this market were not creditable under 7 C.F.R. § 981.441(c) (1992). *Id.* 158a-162a, 172a, 226a.

Neither the generic advertising program nor the few creditable activities that almond growers other than Blue Diamond engaged in, the ALJ found, increased demand for almonds. *Id.* 157a-163a, 217a-226. To the extent the Board's generic advertising had any effect, it was primarily to benefit Blue Diamond, since the generic ads were aimed at the retail, end-user market dominated by Blue Diamond. *Ibid.*[5]

On the basis of these factual findings, the ALJ concluded that the challenged advertising program violated the First Amendment under the three-part test for commercial speech restrictions set forth in *Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557, 564 (1980). Under *Central Hudson*, the ALJ held, the government was required to demonstrate (i) the existence of a substantial government interest; (ii) that the challenged speech restriction directly advanced the government interest; and (iii) that the speech restriction was not more extensive than necessary. App. 155a-165a, 226-227a.

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5. The ALJ noted that, under the 1994 revisions of the marketing order, more money was expected to be available for generic almond advertising. App. 162a. It concluded, however, that there was no evidence that this program — unlike all previous almond advertising — would be effective at increasing demand.

The ALJ agreed that the government has a substantial interest in stimulating demand for almonds in order to enhance returns to producers and stabilize the health of the almond industry. *Ibid.* Nonetheless, it held, there was no evidence that the challenged program furthered that interest; to the contrary, the evidence showed that the only interests furthered by the program were those of Blue Diamond as compared to its competitors. *Id.* 152a-160a, 162a, 216a-226a. Finally, the ALJ concluded, the strict content-based limits on giving credit against mandatory assessments for a handler's own advertisements, and the lack of correlation between those limits and the government's purported interest, showed that the challenged speech restrictions were more extensive than necessary. *Id.* 163a-165a, 226a-227a. Accordingly, the ALJ held, the challenged provisions of the almond marketing order, including both pre-1994 and current versions of the regulations, were unconstitutional. *Ibid.*

2. The U.S. Department of Agriculture appealed the ALJ's decision to the USDA's judicial officer, who stayed the proceedings pending the U.S. Supreme Court's decision in *Wileman*, which upheld the constitutionality of mandatory funding by all industry members of a program of industry-wide generic advertising.[6] Following the *Wileman* decision, the judicial officer reversed the ALJ, and held that *Wileman* foreclosed petitioners' First Amendment claims. App. D, 23a at 128a-139a.

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6. As noted above, the *Wileman* decision upheld the constitutionality of the first type of marketing orders, which require all industry members to fund generic advertising but do not apply content-based restrictions — with corresponding financial burdens and benefits — on industry members' own commercial speech. This case, in contrast, involves the constitutionality of financial credits against those mandatory assessments based on the content of the industry member's own speech.

3. Petitioners filed suit in the U.S. District Court for the Eastern District of California, seeking a declaration that the almond marketing order, 7 C.F.R. Pt. 981, violated their First Amendment rights. App. B, 12a. The district court dismissed the claims pursuant to *Wileman*.

4. On appeal, the Ninth Circuit affirmed dismissal of petitioners' First Amendment claims. App. A, 1a. The court first asked whether *Wileman* was dispositive, a question which required consideration of

> (1) whether the advertising programs impose a restraint on Cal-Almond's freedom to communicate any message to any audience; (2) whether the advertising programs compel Cal-Almond to engage in any actual or symbolic speech; and (3) whether the advertising programs compel Cal-Almond to endorse or finance any political or ideological views that are not germane to the purposes for which the compelled association is justified.

App. 5a.

The Ninth Circuit held that the challenged program did not restrain Cal-Almond's freedom to communicate an advertising message of its choice because it did not directly prohibit non-creditable advertisements. It deemed conclusive on this point *Wileman*'s holding that the First Amendment is not violated by " 'an economic regulation [that] may indirectly lead to a reduction in a handler's individual advertising program.' " App. 6a-7a (quoting *Wileman*, 521 U.S. at 470).

The court next considered, and rejected, Cal-Almond's assertion that the marketing order's financial incentives and disincentives impermissibly compelled speech. Because Cal-Almond and the other dissenting handlers could choose not to engage in commercial advertising but instead to pay the mandatory assessment, the court reasoned, no compelled speech was involved. App. 8a. The court treated as irrelevant the adverse financial consequences stemming from the choice to remain silent rather than convey the government-selected message. *Ibid.*

Finally, the Ninth Circuit reasoned, Cal-Almond's objections to the government-required message were not political or ideological in nature, and the advertising at issue was "germane" to the Act's purpose of promoting consumption of almonds. *Id.* 99a-10a. Accordingly, it upheld the challenged program. *Id.* 11a.

5. In an entirely separate action, filed several years before the initiation of these proceedings, two of the petitioners in this action, Cal-Almond and Carlson Farms, joined by two other almond handlers who are not parties in this case, submitted administrative petitions challenging the constitutionality of the almond marketing order's generic advertising program and creditability provisions. After exhausting administrative remedies, they sought review in the U.S. District Court for the Eastern District of California, which dismissed the action. On appeal, the Ninth Circuit reversed in part, holding that both the generic and the creditable advertising programs violate the First Amendment. *Cal-Almond, Inc. v. U.S. Dep't of Agric.*, 14 F.3d 429, 434-408, 449 (9th Cir. 1993). (App. F, 228a.)

The case was remanded to the district court, which ordered the government to pay $4.3 million. The Ninth Circuit, on appeal, affirmed in part and reversed in part. *Cal-Almond, Inc. v. Department of Agric.*, 67 F.3d 874 (9th Cir. 1995). The government then petitioned for a writ of certiorari, asking that, in light of its then-pending petition for a writ of certiorari in *Glickman v. Wileman Bros. & Elliott, Inc.*, No. 95-1184 (filed Jan. 1996), the Court dispose of the *Cal-Almond* petition in accord with its disposition of *Wileman*. U.S. Pet'n for Cert., *United States Dep't of Agriculture v. Cal-Almond, Inc.*, No. 95-1879 (filed May 1996). This Court granted the petition in *Wileman* and reversed the Ninth Circuit, holding that the generic advertising program in the plum marketing order did not violate the First Amendment. 521 U.S. 457 (1997). It then granted the government's petition in *Cal-Almond*, vacating the Ninth Circuit's decision and remanding for further consideration in light of the decision in *Wileman*.

On remand, without considering additional briefs or submissions, the Ninth Circuit issued an order stating: "This case is REMANDED to the district court with instructions to dismiss Cal-Almond's First Amendment claim. *See Glickman v. Wileman Bros. & Elliott, Inc.*" Cal-Almond and the other plaintiffs then petitioned for a writ of certiorari, arguing that the Ninth Circuit had improperly refused to consider differences between the generic advertising program upheld in *Wileman* and the content-based creditability provisions challenged in the case before it. *Cal-Almond, Inc. v. U.S. Dep't of Agriculture*, No. 97-1935 (filed June 1998). The petition was denied. 119 S. Ct. 57 (1998). We assume that the denial is attributable to the interlocutory nature of the appeal. *See Columbia Union College v. Clark*, 119 S. Ct. 2357, 2358-2359 (1999) (Thomas, J., dissenting from denial of cert.).

REASONS FOR GRANTING THE WRIT

This case presents a question of vital importance under the First Amendment: whether the government can impose a financial assessment on agricultural handlers based on the content of their commercial advertising. Under the challenged advertising program, almond handlers who convey a government-approved message — a message that, not coincidentally, benefits one dominant industry member to the detriment of its competitors — receive substantial financial credit against their mandatory assessment. Almond growers who refuse to convey this government-approved message, either by remaining silent or by selecting their own message, must pay.

The Ninth Circuit's approval of this outcome is irreconcilable with basic First Amendment principles. Freedom of speech is presumptively violated by government regulation of the content of private citizens' speech; the same rule applies whether the government regulates speech directly, by banning or requiring a particular message, or instead uses financial incentives to accomplish indirectly the same end. It is undeniable that, under the standard applied to content-based restrictions of commercial speech, the challenged regulations must be struck down.

The Ninth Circuit's reflexive and unthinking invocation of the *Wileman* holding — a decision which not only fails to support the challenged advertising regulations, but affirmatively demonstrates their constitutional flaws — merely illustrates the need for this Court's review. The Ninth Circuit converted the limited holding in *Wileman* into a blank check for content-based commercial speech restrictions, including what amounts to regulation of the content of the

speaker's own advertising, in violation of this Court's statement of the holding in *Wileman*. This Court, as the only forum that can clarify its decision, and protect petitioners' constitutional rights, should do so.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S HOLDINGS

1. The creditable and credit-back advertising programs at issue in this case impose rewards and penalties based on the content of the handlers' own speech. If a handler's advertisements pass muster in the eyes of the Almond Board, it receives a 100% or two-thirds credit (under the pre-1993 and current regulations, respectively) against the portion of its mandatory assessment used by the Board for advertising, marketing, and promotions. If its advertisements do not meet with the Board's approval, or if the handler chooses not to advertise (and instead spends its money on other, effective means of promoting almond consumption), it must pay the full assessment. The program thus constitutes both a compulsion to speak and a content-based judgment on what to say, backed up by substantial financial rewards and penalties.

As this Court has repeatedly recognized, "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time*, 468 U.S. 641, 648-649 (1984); *accord, e.g., Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 116 (1991); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987). Although content-based regulations are not *per se* unconstitutional, they are presumptively invalid under the First Amendment. *See Simon & Schuster*, 502 U.S. at 115; *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

The government's use of financial incentives and disincentives to accomplish content-based regulation does not alter this constitutional analysis, for "the government * * * may not seek to achieve an unlawful end either directly ***or indirectly***." *Elrod v. Burns*, 427 U.S. 347, 359 n.13 (1976) (plurality opinion) (emphasis added); *see also, e.g., American Communications Ass'n v. Douds*, 339 U.S. 382, 402 (1950) ("indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights" as outright bans). To put the point more succinctly, First Amendment "[r]ights are infringed both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason." *Elrod*, 427 U.S. at 359 n.13. Indeed, one of the crucial concerns of the Founders — a concern that ultimately led to adoption of the Bill of Rights — was that the government would use content-based taxation of the press to eliminate disfavored messages even if did not ban the messages outright. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 584-585 & n.6 (1983).

When the government gives favorable financial treatment to certain speech, it "provides a significant incentive toward more expression"; conversely, government denial of financial incentives places "a significant burden on expressive activity" and "chills potential speech before it happens." *United States v. National Treasury Employees Union*, 513 U.S. 454, 468-469 (1995). Because this result is disfavored under our constitutional system, which protects a "marketplace of idea," laws "impos[ing] differential [financial] burdens upon speech because of its content" are subject to the same scrutiny as content-based bans on that speech. *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622,

642 (1994); *see also, e.g., National Treasury Employees Union*, 513 U.S. at 469-470; *Simon & Schuster*, 502 U.S. at 116; *Leathers*, 499 U.S. at 447.

Admittedly, the speech at issue in this case is commercial, rather than political or ideological. But truthful, non-misleading commercial speech is protected under the First Amendment. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496-97, 501, 518, 528 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 472 (1988); *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 638 (1985); *In re R.M.J.*, 455 U.S. 191, 203 (1982); *Bates v. State Bar*, 433 U.S. 350, 363-366 (1977); *Virginia State Bd. of Pharmany v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-762 (1976). The strong societal interest in free speech extends to commercial advertisements as well as to political and ideological speech:

> The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.

Edenfield v. Fane, 507 U.S. 761, 767 (1993); *see also Virginia Pharmacy*, 425 U.S. at 764.

This Court has applied the same level of scrutiny to bans and content-based financial disincentives both where regulated speech is entitled to the protection of strict scrutiny, and where the speech receives lesser protection. In *National*

Treasury Employees Union, the Court recognized that "Congress may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large," holding that government speech restrictions would be upheld so long as the government's interest, " 'as an employer, in promoting the efficiency of the public services it performs through its employees' " outweighed the employee's interest " 'in commenting upon matters of public concern.' " *National Treasury Employees Union*, 513 U.S. at 465-466 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)). Notwithstanding the lower standard of review applicable to restrictions on government employees' speech, the Court applied the principle articulated in *Simon & Schuster* and *Turner Broadcasting* — that content-based financial burdens on speech are subject to the same level of scrutiny as bans on that speech. 513 U.S. at 468-469.

The same principle governs here. Because the creditable and credit-back regulations impose a content-based financial burden on commercial speech, they must be scrutinized under the *Central Hudson* test. Under that test, it is exceedingly improbable that they could be upheld.

The challenged regulations do not even come close to satisfying the *Central Hudson* requirement that commercial speech restrictions directly advance the governmental interest asserted. As the ALJ pointed out below, the government's interest in stimulating demand for almonds, while substantial, is not furthered one whit by the challenged advertising program, "whose essential purpose * * * was not to engage in generic advertising and promotion, but rather to induce expenditures by all handlers equivalent * * * to those

expended by Blue Diamond for its brand advertising." App. 157a-160a. To the extent that content-based financial incentives for advertising could further the government's interest, the strict limits on what advertising is creditable, and the apparently arbitrary connection between these content-based limits and the government's interest in increasing demand for almonds, show that the limits are more extensive than necessary to further than interest. *Id.* 163a-165a.[7] And Blue Diamond's own advertisements, to the extent that they are furthered by the content-based regulations, do not increase overall consumption of almonds. The ALJ's unequivocal factual findings on this point (App. 158a-162a, 224a-226a) merely prove the correctness of this Court's observation in *Wileman* that "[i]ndependent advertising [is] primarily motivated by the individual competitor's interest in maximizing its own sales, rather than in increasing the overall consumption of a particular commodity." 521 U.S. at 475.

2. Rather than apply the *Central Hudson* test to the challenged restrictions, the Ninth Circuit invoked the holding and analysis in *Wileman* as establishing their constitutionality. But the First Amendment issue presented here is fundamentally different from the issue resolved in *Wileman*. Far from supporting the Ninth Circuit's disposition of petitioners' claims, *Wileman* confirms that the creditable

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7. That the Board's generic advertisements promoted retail almonds — to the primary, if not exclusive, benefit of Blue Diamond — suggests that ***none*** of the marketing order program, including both the mandatory advertisements and the creditability regulations, were designed to further the economic interests of almond growers. For almond growers other than Blue Diamond, the program creates a scenario of "Heads I win, tails you lose."

and credit-back advertising regulations violate the First Amendment.[8]

In *Wileman*, the Court held that three characteristics of the mandatory assessment program it was considering distinguished it from laws that abridge the freedom of speech:

> First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views.

521 U.S. at 469-70 (footnotes omitted). Under the first two of these three criteria, the creditable and credit-back advertising programs violate the freedom of speech.

a. First, as discussed above, the challenged creditable and credit-back advertising programs ***do*** impose a restraint on the freedom of the producer to communicate the message of his choice to the public, the Ninth Circuit's holding to the contrary notwithstanding. The mandatory assessment program upheld in *Wileman* had no effect on the handlers' own speech. The handlers simply paid assessments into a fund, which was used to promote all products through generic advertising. The program involved no scrutiny of the handlers' own speech; it offered neither incentive for speaking in one way nor disincentive for speaking in another.

8. The analysis of the four dissenting Justices in *Wileman* would apply with even greater force to the creditable advertising program. *See* 521 U.S. at 477-478 (Souter, J., dissenting); *id.* at 504 (Thomas, J., dissenting).

The amount of the assessment was wholly unaffected by the handler's own speech.

Here, in contrast, some messages entitle a handler to monetary credit and other messages force the handler to pay the full assessment. As noted above, this Court has repeatedly recognized that financial incentives or burdens based on the content of speech are constitutionally suspect. *See* pages 15-16, *supra*. This fundamental distinction renders inapplicable the analysis and holding in *Wileman*.

The Ninth Circuit relied on the *Wileman* Court's observation that the First Amendment is not violated by an " 'economic regulation' " that " 'may indirectly lead to a reduction in a handler's individual advertising program' " to uphold the challenged regulations App. 6a-7a (quoting *Wileman*, 521 U.S. at 470). But of course, the regulations at issue here are ***not*** "economic regulation[s]," nor is their effect on handlers' advertising programs "indirect." By imposing content-based restrictions on truthful, nonmisleading advertising, and by tying those restrictions to the assessment amounts that industry members are required to pay, the challenged program imposes a direct tax on disfavored commercial speech. By couching the question as one of reduced resources for speech, rather than acknowledging that the challenged regulation imposed a direct financial burden on disfavored speech, the Ninth Circuit missed the point — and, in the process, radically broadened the scope of *Wileman*. Surely that case was not intended to permit any and all content-based restrictions on commercial speech, so long as they are enforced through financial incentives rather than a flat ban.[9]

9. Moreover, the Ninth Circuit utterly ignored the findings of the ALJ that the program was intentionally designed to benefit Blue (Cont'd)

b. Second, unlike the advertising program in *Wileman*, the challenged regulations in this case ***do*** compel handlers to engage in actual speech, on penalty of payment of a greater assessment. In *Wileman*, handlers had to pay their full assessment whether they engaged in their own advertising or not. In this case, the program imposes the functional equivalent of a fine or tax on handlers who do not advertise or — more importantly — do not advertise in the manner dictated by the government.

The Ninth Circuit appeared to believe that financial incentives of this type were not relevant because Cal-Almond and the other petitioners were not literally forced to speak the government-approved message. The court characterized petitioners as "free to advertise or otherwise communicate any message that [they] desire[ ] in any matter that [they] desire[ ]" — albeit only by suffering the financial consequences of refusing to convey the approved government message. App. 8a. As noted above, this distinction between banning or mandating speech directly, and accomplishing the same end through content-based financial assessments, is unsupportable.

c. Finally, the challenged advertising program involves an additional constitutional flaw not present in *Wileman*: the administration of content-based restrictions by a Board dominated by one company, Blue Diamond, whose interests are diametrically opposed to those of petitioners. App. 165a; R. 135-139. Every penny of petitioners' advertising deemed not to satisfy the Almond Board's criteria is a penny more to advertise Blue Diamond's retail almond business. To vest

(Cont'd)
Diamond, at the expense of other handlers in the industry (including petitioners), an important fact totally absent in *Wileman*.

the power to exercise subjective judgments about the content of private speech in a non-neutral decisionmaker with a financial interest in deeming the content of that speech "unacceptable," violates fundamental principles of freedom of speech. *See Air Line Pilots Ass'n v. Miller*, 118 S. Ct. 1761 (1998) (noting that *Central Hudson* requires " 'an impartial decisionmaker' "); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130-136 (1992); *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 (1986). *Cf. Gibson v. Berryhill*, 411 U.S. 564, 578-579 (1973).

In sum, the Ninth Circuit's decision upholding the creditable and credit-back advertising programs cannot be reconciled with the limits imposed by this Court on content-based speech incentives; nor can it be reconciled with *Wileman*. Its disregard of basic First Amendment principles warrants further review.

II. THIS CASE RAISES IMPORTANT AND RECURRING ISSUES

1. The Ninth Circuit's decision has far-ranging impact for content-based regulation of commercial speech in marketing orders. Under the Act, the Secretary is authorized to establish credit programs for many other regulated agricultural commodities subject to mandatory assessments, including raisins, walnuts, olives, filberts, and Florida Indian River grapefruit. 7 U.S.C. § 608c(6)(I). Acting on this authority, the Secretary has adopted numerous marketing orders that incorporate content-based credits against mandatory assessments, each of which applies only to handlers within the jurisdiction of the Ninth Circuit. *See, e.g.*, 7 C.F.R. § 932.45(a)(2) (California olives); § 982.58(b) (filberts and hazelnuts from Oregon and

Washington); and § 989.53(b) (California raisins). The practical effect of this case, therefore, is to establish in one fell swoop the constitutionality of each of these programs — which do not differ in any manner that would be relevant under the Ninth Circuit's analysis below. That result — and the serious First Amendment questions it raises — should be reviewed by this Court.

2. The Ninth Circuit's reflexive invocation of *Wileman* to uphold financial penalties for government-disfavored commercial speech provides an additional reason why this Court should grant review. There is widespread confusion among lower courts and commentators about the proper scope and applicability of *Wileman*. Lower courts have diverged sharply, for example, on whether *Wileman* permits mandatory funding of generic advertising only in industries subject to comprehensive economic regulation, or whether it also permits mandatory funding of stand-alone advertising programs. Compare *Goetz v. Glickman*, 149 F.3d 1131 (10th Cir. 1998); *Gallo Cattle Co. v. California Milk Advisory Bd.*, 185 F.3d 960 (9th Cir. 1999), with *United Foods, Inc. v. United States*, 197 F.2d 221 (6th Cir. 1999). *Wileman* has also been heavily criticized by academic commentators,[10]

10. *See, e.g.*, Fried, *Perfect Freedom, Perfect Justice*, 78 B.U. L. REV. 717, 743 (1998); Note, *Glickman v. Wileman Bros. & Elliott, Inc.: Has The Supreme Court Lost Its Way?*, 27 STETSON L. REV. 1461, 1484 (1998); Note, *Constitutional Law C Forced Advertising: Free Speech Or Not Even?*, 33 LAND & WATER L. REV. 779, 789 (1998); Goach, *Free Speech And Freer Speech: Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), 21 HARV. J.L. & PUB. POL'Y 623, 632 (1998); Casenote, *Commercial Speech — Compelled Advertising*, 111 HARV. L. REV. 319, 320, 325-326 (1997); Comment, *The Effect of Glickman v. Wileman Brothers & Elliott, Inc. on Nongeneric Commodities: A Narrow Focus on a* (Cont'd)

many of whom fear that it could open the floodgates to government interference with the marketplace of commercial ideas. Decisions like the Ninth Circuit's ruling below give credence to those warnings and add to the growing uncertainty. Yet on its own terms, the *Wileman* decision was carefully limited to generic advertising programs that were part of a comprehensive economic regulatory scheme. 521 U.S. at 469, 474-477. This case provides the opportunity for this Court to show the constitutional import of those limits, and to demonstrate that *Wileman* did not — despite the contrary views of lower courts and commentators — overrule *sub silentio* the Court's prior commercial speech cases.

(Cont'd)

Broad Rule, 9 SAN JOAQ. AG. L. REV. 95 (1999); Comment, *Glickman v. Wileman Brothers & Elliott, Inc.: Don't Put Words in my Mouth*, 33 New Engl. L. Rev. 989 (1999); SMOLLA & NIMMER, FREEDOM OF SPEECH § 20:45, at 20-114 (1998); Casarez, *Don't Tell Me What To Say: Compelled Commercial Speech and the First Amendment*, 63 Mo. L. REV. 929, 960-965 (1998); Note, *Leading Case: Freedom of Speech and Association Clauses: Commercial Speech — Compelled Advertising*, 111 HARV. L. REV. 319, 324-329 (1997).

CONCLUSION

The petition for a writ of certiorari should be granted.

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